

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Entergy Services, Inc.	Docket Nos.	ER03-1272-005
		ER03-1272-006
		EL05-22-000
		EL05-22-001
		EL05-22-002

ORDER DENYING REHEARING AND CANCELING HEARING

(Issued April 5, 2007)

1. On March 22, 2005, the Commission issued an order holding in abeyance a hearing instituted under section 206 of the Federal Power Act (FPA)¹ to investigate the implementation of Entergy Services, Inc.'s² Available Flowgate Capacity (AFC) program (AFC Hearing).³ Several parties⁴ filed a motion for interim relief requesting expedited

¹ 16 U.S.C. § 824e (2000).

² Entergy Services, Inc. filed on behalf of the Entergy Operating Companies, which are Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, LLC, Entergy Mississippi, Inc., and Entergy New Orleans, Inc. (collectively, Entergy).

³ *Entergy Services, Inc.*, 110 FERC ¶ 61,296 (2005) (AFC Abeyance Order).

⁴ Occidental Chemical Corporation, The Dow Chemical Company, Calpine Corporation, Cottonwood Energy Company LP, Union Power Partners, LP, NRG Energy, Inc., Suez Energy North America, Inc., Lafayette Utilities System, Municipal Energy Agency of Mississippi, Louisiana Energy and Power Authority, Mississippi Delta Energy Agency, Clarksdale Public Utilities Commission, Public Service Commission of Yazoo City, Arkansas Electric Cooperative Corporation, Southeast Electricity Consumers

(continued)

review of the issues involved in the AFC Hearing and requesting an audit and stakeholder process to review Entergy's AFC process.⁵ The Intervenor also requested rehearing⁶ of the AFC Abeyance Order. Entergy filed a motion to cancel the AFC Hearing on December 18, 2006. In this order, we deny rehearing, deny the motion for interim relief as moot, and cancel the AFC Hearing.

I. Background

2. The Commission instituted hearing procedures to investigate the implementation of Entergy's AFC program, whether Entergy has complied with the Commission's prior orders on AFC matters, and whether Entergy's provision of access to its transmission system is just, reasonable and not unduly discriminatory.⁷ The Commission later held that hearing in abeyance in light of Entergy's Independent Coordinator of Transmission (ICT) proposal which the Commission tentatively approved.⁸

3. In the AFC Abeyance Order, the Commission stated that, because the ICT might resolve matters at issue in the AFC hearing, the Commission was willing to hold that hearing in abeyance if Entergy notified the Commission of its intent to file its section 205 filing⁹ within 30 days of the date of that order, and would hold the AFC hearing in abeyance for an additional 60 days after a Commission order approving the section 205 filing in order for Entergy to file to install an independent entity with the ICT functions. We stated that we would continue to hold the AFC hearing in abeyance and would cancel the hearing when the ICT begins to perform its functions.

4. Intervenor requested expedited review of the issues involved in the AFC Hearing. They stated that the ICT proposal would not correct the harms incurred by them under

Association, Dynegy Power Marketing, Inc., and Calcasieu Power, LLC (collectively, Intervenor).

⁵ The motion for interim relief was filed on April 8, 2005 (April 8, 2005 Filing).

⁶ The request for rehearing was filed on April 21, 2005.

⁷ *Entergy Services, Inc.*, 109 FERC ¶ 61,281 (2004) (AFC Order).

⁸ *Entergy Services, Inc.*, 110 FERC ¶ 61,296 (2005) (Guidance Order).

⁹ The Commission stated in the Guidance Order that it expected Entergy to file the full set of tariff provisions implementing the ICT proposal under section 205 of the FPA within 60 days of the date of that order (the ICT Filing).

Entergy's AFC methodology. Instead, the Intervenors proposed two processes they state are designed to minimize the burden on Entergy and other market participants, while still pursuing a thorough and timely review of the AFC concerns: (1) an audit process and (2) a modified stakeholder process.¹⁰

5. Entergy made the ICT Filing in accordance with the Guidance Order, and the Commission conditionally approved it.¹¹ Entergy made a filing in compliance with that order which was conditionally approved.¹²

6. Southwest Power Pool (SPP) began serving as the Reliability Coordinator for the Entergy control area on November 1, 2006, and began the remaining functions as the ICT (such as evaluating service requests and calculating AFCs) on November 17, 2006.¹³ SPP submitted its First Quarterly Performance Report on March 9, 2007.

7. Entergy has now filed a motion to cancel the AFC Hearing because the ICT has begun to perform its functions. The Lafayette Utilities System, the Louisiana Energy and Power Authority, and the Municipal Energy Agency of Mississippi (collectively, L-M Municipals) submitted an answer to Entergy's motion requesting that, if the motion to cancel the AFC Hearing was granted, the Commission clarify that that decision does not affect Entergy's continuing obligation to provide transmission meeting the standard of good utility practice to load-serving entities that depend upon the Entergy grid. Occidental Chemical Corporation (OCC) submitted an answer stating that: (1) the ICT is an inadequate substitute for a section 206 hearing; (2) Entergy's customers still lack

¹⁰ April 8, 2005 Filing. On April 25, 2005, Entergy filed a response to that motion stating that (1) the Commission correctly determined that the matters set for hearing should be addressed through timely implementation of the ICT proposal; and (2) the additional procedures proposed by the Intervenors would not provide a fair and impartial evaluation of the AFC process and would not facilitate timely implementation of the ICT proposal.

¹¹ *Entergy Services, Inc.*, 115 FERC ¶ 61,095, *errata notice* May 4, 2006, *order on reh'g*, 116 FERC ¶ 61,275, *order on compliance*, 117 FERC ¶ 61,055 (2006).

¹² *Entergy Services, Inc.*, 117 FERC ¶ 61,055 (2006).

¹³ *See* Entergy November 16, 2006 Compliance Filing, Docket No. ER05-1065-004, at n.3.

meaningful transmission access; and (3) canceling the AFC Hearing would violate OCC's due process rights.¹⁴ Entergy submitted an answer to OCC's answer.

II. Requests for Rehearing

8. Intervenors filed a request for rehearing of the AFC Abeyance Order. They assert that the Commission's decision to cancel the AFC hearing once the ICT began to perform its function was in error. They say that because the Commission determined that the rates, terms and conditions of service under Entergy's tariff might not be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful, the Commission must determine the just and reasonable rates, terms or conditions. The Intervenors allege that the problems with Entergy's AFC methodology are worse than originally anticipated and that there is no indication that these problems have been solved. Moreover, the Intervenors contend that the Commission's assumption that the ICT will assure just and reasonable rates does not satisfy the Commission's duty under section 206 to ensure against undue discrimination and preference in providing jurisdictional services.

9. Further, the Intervenors maintain that canceling the AFC Hearing because ICT implementation may resolve the matters at issue is arbitrary and capricious and is not reasoned decision-making. They state that the AFC Abeyance Order recognizes that the ICT may not resolve issues in the AFC hearing, but nevertheless stated that the Commission would cancel the hearing when the ICT begins to perform its functions. Finally, the Intervenors argue that the AFC Abeyance Order renders the refund protection in the AFC Order illusory because it rules out remedies at an early stage in the proceeding.

III. Procedural Issues

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), any notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Entergy's April 25, 2005 and

¹⁴ On March 8, 2007, OCC filed comments in Docket No. ER05-1065-007 stating that the flaws discovered by the ICT demonstrate that the hearing should indeed go forward. OCC attached its January 3, 2007 answer to that filing.

January 18, 2007 answers or L-M Municipal's January 3, 2007 answer, and will, therefore, reject them. We will accept OCC's January 3, 2007 answer because it has provided information that assisted us in our decision-making process.

IV. Discussion

12. The Commission denies rehearing, denies the motion for interim relief as moot,¹⁵ and cancels the AFC Hearing established in this proceeding.

A. Rehearing

13. The Commission did not assume that the ICT would assure just and reasonable rates. We stated that, because the ICT might resolve matters in the AFC hearing, we were willing to hold the hearing in abeyance pending Entergy's filing its ICT proposal and our reviewing it to ensure that it was just and reasonable. We said that if the Commission approved the ICT proposal, the AFC Hearing would no longer be necessary because it would be replaced by a proposal found by the Commission to be just and reasonable.

14. The Commission accepted Entergy's proposal to implement the ICT as an independent entity that would oversee the AFC calculations in an unbiased and non-discriminatory manner. The ICT's recent quarterly report indicates that it has been evaluating Entergy's implementation of its AFC process and has made findings and recommendations as appropriate. In the report, the ICT notes that it has completed the AFC audit review. During this review, the ICT evaluated Entergy's implementation of its AFC process and made ten recommendations as a result of the review. The ICT notes that six of the recommendations have been resolved, mainly software issues. The remaining four issues, which include recommending upgrading facilities that limit AFC, will be addressed in the stakeholder process. Since the ICT incorporates a stakeholder process, there is a forum for transmission customers to discuss and resolve transmission issues, and AFC issues can be addressed in this forum. Finally, we note that Entergy must comply with Order No. 890, the OATT reform rule, which requires Entergy to work with the North American Electric Reliability Council (NERC) to develop reliability standards that accomplish the Available Transfer Capability (ATC) reforms required in

¹⁵ The relief sought was an audit and stakeholder process, and since both those processes are occurring, the motion is moot.

this rulemaking.¹⁶ Specifically, NERC is developing standards for three ATC calculation methodologies (contract or rating path ATC, network ATC, and network AFC) and the Commission concluded that use of the ATC calculation methodologies developed by NERC will be acceptable.¹⁷ Therefore, the requests for rehearing of the AFC Abeyance Order are denied.

B. Cancellation of AFC Hearing

15. OCC claims that the ICT is an inadequate substitute for a section 206 hearing, but does not dispute that the conditions of the AFC Abeyance Order have been met. OCC's real argument is with the Commission's determination in the AFC Abeyance Order that the ICT might resolve matters at issue in the AFC Hearing. In the AFC Abeyance Order, the Commission stated that if the filing installing the ICT was approved, then the Commission would continue to hold the AFC Hearing in abeyance and would cancel the hearing when the ICT began to perform its functions.¹⁸ Also, if Entergy's ICT proposal, including matters related to AFC, had not been just and reasonable, the Commission would have denied Entergy's petition and reinstated the AFC Hearing. It is within the Commission's discretion, and it is a prudent use of the agency's resources, to cancel a hearing when the matters at issue in the hearing are being addressed through a separate process. The Commission finds that it was within its discretion to approve Entergy's ICT proposal, and that since the ICT has begun performing its functions, it is within the Commission's discretion to cancel the AFC Hearing instituted in this proceeding, as provided in the AFC Abeyance Order.¹⁹

16. Given the early stage of the ICT performing its functions, we find that OCC has not sufficiently demonstrated at this time that the ICT will not result in "meaningful"

¹⁶ Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 Fed. Reg. 12,266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241---- (2007) at P 196.

¹⁷ *Id.* P 210, 211.

¹⁸ *Entergy Services, Inc.*, 110 FERC ¶ 61,296 at P 5.

¹⁹ Moreover, even if the hearing had found Entergy's existing AFC program to be unjust, unreasonable and unduly discriminatory, Entergy would have been required to amend the terms and conditions of its tariff, a prospective action. The ICT is an alternative prospective remedy to whatever prospective remedy might have resulted from the hearing into Entergy's implementation of its AFC process.

transmission access. We note that the ICT has only submitted one report thus far.²⁰ We will continue to carefully review the future quarterly performance reports submitted by the ICT. The issue of transmission access can be revisited in a future proceeding if, after the ICT has been in place for a reasonable time, OCC believes that transmission access is still an issue. Also, the ICT provides a stakeholder process that provides a forum for transmission customers to voice their concerns.

17. Finally, the Commission finds that OCC has failed to make an adequate argument, under *Matthews v Eldridge*²¹ that its due process rights would be violated by the cancellation of the AFC Hearing. OCC has had its “opportunity to be heard” because it has been an active participant in these proceedings from the beginning, and “an evidentiary trial-type hearing is only necessary where material issues of fact are in dispute that cannot be resolved on the basis of the written record.”²²

The Commission orders:

(A) The requests for rehearing are hereby denied, as discussed in the body of this order.

(B) The motion for interim relief is denied as moot, as discussed in the body of this order.

²⁰ As stated previously, in the March 9, 2007 FERC quarterly ICT report, the ICT indicated that it had completed the AFC Audit Review. During the review, the ICT evaluated Entergy’s implementation of its AFC process and made findings and recommendations as appropriate. As noted above, six of the ICT’s recommendations have been resolved, and the remaining four are still being addressed through the stakeholder process.

²¹ 424 U.S. 319 (1976).

²² *Tennessee Gas Pipeline Co.*, 70 FERC ¶ 61,244 (1995); *accord, e.g., Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 128-129 (D.C. Cir. 1982); *Public Serv. Co. of New Hampshire v. FERC*, 600 F.2d 944, 955 (1979).

(C) The hearing in Docket No. EL05-22-000 is hereby cancelled, as discussed in the body of this order.

By the Commission.

(S E A L)

Philis J. Posey,
Acting Secretary.